IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1395

CHRISTINA MARIE SMITH, a minor,

Petitioner,

vs.

LARRY JOE SHAFER, JUDITH KAREN SHAFER, GEORGE SMITH and NATALIE SMITH,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT, FOURTH DISTRICT STATE OF ILLINOIS

LORENCE H. SLUTZKY
29 South LaSalle Street - 860
Chicago, Illinois 60603
(312) 332-7760

Counsel and Guardian Ad Litem for Petitioner Christina Marie Smith

ROBBINS, SCHWARTZ, NICHOLAS & LIFTON, LTD.
29 South LaSalle Street - 860
Chicago, Illinois 60603

DOUGLAS C. NOHLGREN
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611

Of Counsel

Midwest Law Printing Co., Chicago 60601, Financial 6-3988

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The petitioner, Christina Marie Smith, a minor, by her guardian ad litem, Lorence H. Slutzky, prays that a writ of certiorari be issued to review the judgment and opinion of the Illinois Appellate Court, Fourth District entered in this proceeding on May 13, 1976.

OPINION BELOW

The opinion of the Illinois Appellate Court, Fourth District is reported as *In the Matter of the Adoption of Christina Marie Smith, a minor*, 38 Ill. App. 3d 217, 347 N.E.2d 292 (1976) and as *Larry Joe Shafer and Judith Karen Shafer v. Christina Marie Smith*, 38 Ill. App. 3d 304, 347 N.E.2d 304 (1976), which appears in Appendix I and Appendix II, respectively.

JURISDICTION

The judgment of the Illinois Appellate Court was entered on May 13, 1976. A timely petition for leave to appeal was filed in the Illinois Supreme Court and denied on October 21, 1976. A petition for reconsideration was timely filed and denied on November 12, 1976. A timely application for extending time for filing a petition for a writ of certiorari on or before April 11, 1977 was granted by Justice Stevens by order dated February 2, 1977. This court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether a child's statutory right to and liberty interest in a consideration of her best interests and welfare in her placement in an adoption proceeding were deprived without due process of law by the reviewing court where the reviewing court relied on new factual issues neither raised nor developed in the trial court where the new factual issue became dispositive of the placement.

2. Whether due process requires a reviewing court to remand for a new trial when new factual issues are raised and determined to be dispositive by the reviewing court.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution

Amendment XIV

> "SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Christina Marie Smith was born on March 29, 1970, the child of William and Mary Smith (C 2-3). On July 19, 1971, a neglect proceeding was commenced in the Circuit Court of Champaign County, Illinois against the parents (71 J 116). On August 30, 1971, the child was found to be an abused and abandoned child and declared a ward of the state. (Supp. C 2). In November, 1971, the child was placed by the Department of Children and Family Services in the foster home of Larry and Judith Shafer. On December 21, 1972, parental rights were terminated (Supp. C 1) which was vacated on May 30, 1973 because of a procedural defect. (Supp. C 3). On January 26, 1972, the child was sent to live with the paternal grandparents, George and Natalie Smith at their request in California. On September 11, 1972, the child was returned to Illinois by the grandmother on advice of her counsel and without disclosing the reasons to the Department of Children and Family Services (hereinafter referred to as "Department"). The child was again placed in the Shafer home where she lives today.

On December 6, 1972, a petition for adoption was filed by the grandparents (72 A 135) which was later consolidated with the child neglect proceedings. (71 J 116).[1] Parental rights were again terminated on August 31,

[1] Adoption proceedings do not under Illinois law supercede the exercise of a court's jurisdiction under the Juvenile Court Act. The court has a continuing duty to make such orders relating to the child's care, custody and support as reason and justice might require. *People ex. rel. Houghland v. Leonard*, 415 Ill. 135, 112 N.E.2d 697 (1953); Ill. Rev. Stat. ch. 37, § 701-2.

1973. (Supp. C 4). An evidentiary hearing on the adoption was held on May 2, 1974. (Attached as Appendix III is an abstract of the testimony).

The grandmother and grandfather testified as well as Mrs. Henderson, an employee of the Department. The sole issues presented were whether the grandparents were fit adoptive parents and whether the best interests and welfare of the child were served by the adoption.

The trial court having heard the evidence concluded that although the grandparents qualified as adoptive parents in every respect, a difficulty arising from the natural parents-grandparents relationship would be likely to continue and adversely affect the child; that the child would be living as an only child in a home of rather elderly adoptive parents; that in light of the present successful placement of the child in the foster home of the Shafers, who expressed a desire to adopt, as well as the stipulated psychological parental identity the child had with the foster parents, compelled the conclusion that the best interests of the child required that the petition for adoption by the grandparents be denied. (R 107-109).

On July 2, 1974, in the Circuit Court of Piatt County, Illinois, (74 L 32) an evidentiary hearing was held on the petition of Larry and Judith Shafer to adopt Christina Marie Smith. The court having heard the evidence concluded that the Shafers were fit adoptive parents and that it was in the best interest of the child to be adopted by the Shafers. (C 53). (Attached as Appendix IV is an abstract of the testimony).

THE APPELLATE COURT DECISION

The reviewing court focused on only one issue "whether because of the intervention of the Department [of Children and Family Services] or for any other reason the judgment of the trial court is manifestly demonstrated by the record to be contrary to the best interests of the infant." 347 N.E.2d at 294.

The elaboration of the factual finding of the reviewing court is necessary, not to raise a factual issue, but to demonstrate that the reviewing court based its decision on an issue not presented in the trial court, on evidence neither at issue nor presented nor scrutinized by adversarial proceedings as required by due process of law. The Illinois Appellate Court reversed respectively the denial of the grandparents' petition for adoption and the order granting the petition for adoption by the foster parents.

The court on review found overzealous, irresponsible and negligent behavior by some of the employees of the various state agencies which caused official consternation in the grandparents' ability to properly care for Christina due to the intrusions and conflicting demands placed on the family. 347 N.E.2d at 303. The reviewing court found that the grandparents' rights had been violated by the Department and to vindicate this violation reversed the trial court and granted the adoption to the grandparents, totally disregarding the basic rights of the child.

The court *substituted* its review of the facts for that of the trial court by insertion of facts not in evidence, misparaphrasing key testimony and misinterpreting the evidence by deleting key words from the reviewing

court's reading of the testimony in straining to reach its factual conclusion, rather than remanding for a hearing on that issue. The conclusion reached by the court justifying reversal was that the Department by improper "motions" and "manifestly untrue statements" conspired to defeat the grandparents' petition for adoption.

The following exemplary explication is required to demonstrate the reviewing court's determination of fact without an evidentiary hearing on that issue.

The court found that Mrs. Henderson advised the parents to return the child to Illinois for placement in a neutral foster home so that the department could counsel with the natural parents who resided in California, a mere 2,000 miles away. This highly unlikely recommendation found by the Appellate Court disappears by viewing the words deleted from the paraphrased testimony that appears in the opinion of the court. The deleted words from the transcript are placed in italics. The court at 347 N.E.2d at 296 declared:

> "Mrs. Henderson then testified that she counseled Natalie '*that we should place Christina in a neutral home and if it did not work out in California.*' that (*n*) perhaps the best thing would be to bring the child back to Illinois for placement in a neutral home where she herself could work with Christina and perhaps work with the natural parents '*in coming back*' because we were still at that state trying to reunite [her with] the [natural] parents even though I had told the parents and Natalie we were going in for termination if they did not respond." 347 N.E.2d at 296 (C 80).

The court then declares that Mrs. Smith accepted Mrs. Henderson's counsel and invitation, notwithstanding Mrs. Smith's testimony that she brought Christina back

to Illinois solely on advice of her counsel. (C 29). See also, testimony of George Smith. (C 56).

On November 15, 1972, the Department filed a petition to declare Christina a neglected child by reason of abandonment by her custodian. (1st Supp. 2). The court declares that this was "manifestly untrue and ought to have been recognized as untrue by the Department." (347 N.E.2d at 301). This conclusion is allegedly "corroborated" by Mrs. Henderson's testimony which is reflected in the testimony set out above which the court has misread to reach its unsupported conclusion. The testimony of Mrs. Henderson is corroborated by the testimony of Mrs. Smith. She testified that on September 11, 1976, it was agreed between Mrs. Henderson and Mrs. Smith that Christina would be returned to the Shafer foster home. The court concludes that Mrs. Henderson and the Department knew the purpose of the return, i.e., to proceed with the adoption. However, Mrs. Smith testified on returning the child to Mrs. Henderson the following colloquy occurred:

> ". . . I agreed that Mrs. Shafer is a beautiful foster parent, her and her husband and I said that was fine and she said she had just the right party to give Christina to, a doctor and his wife.
>
> Q. Pardon me?
>
> A. At that time Mrs. Henderson told me she knew of a doctor and his wife that wanted Christina and she would surely love to place her there.
>
> Q. For adoption.
>
> A. Yes sir.
>
> Q. Did you object to that?
>
> A. I didn't say anything to her. I just wanted to get out of Illinois and go back and find out how I could come legally to where I could be before a judge." (C 48).

The court, based upon its reading of the record, concludes that the Department acted "remarkably inconsistent with the truth" by finding the custodians abandoned the child. The record reflects the grandmother returning the child unexpectedly without reason and without explaining her desire to adopt. What other conclusion could have logically followed? The court then declares that this is consistent with the testimony of George Smith, "that their motives were subject to suspicion." (347 N.E.2d at 301). The record is devoid of any such statement or suggestion by Mr. Smith. (C 53-64). The court then states that Mrs. Henderson's failure to deny that she was aware of the Smiths' intent to adopt implicitly constitutes an admission. (347 N.E.2d at 301). The court apparently forgets that neither Mrs. Henderson nor the Department were a party on trial and the conduct of the Department and its employees was never an issue at trial.

The court then declares that the Department made repeated efforts to frustrate the adoption proceeding filed by the Smiths. (347 N.E.2d at 301). Nowhere in the record is this reflected. The court also declared that Mrs. Henderson effected delays by obtaining court authority for an investigative report of the grandparents. However, the record reflects that on December 13, 1972, the Department was ordered by the circuit court (apparently *sua sponte*) to make a statutory (Ill. Rev. Stat. ch. 4, § 9.1-6) background investigation. The Department had not appeared in the matter nor was it even present in court. (R 14).

The court reports that the New Jersey investigative report when offered into evidence was objected to by "Mrs. Henderson and the Department." (347 N.E.2d at 302). The record reflects that counsel for the Depart-

ment (C 34) and the guardian ad litem (C 35) raised proper objections which were overruled; but by Mrs. Henderson? Indeed!

The court asserts that myriad delays were caused by the Department, however, the record does not reflect why or who caused delays. Yet, the long delays between hearing dates reflect that the grandparents were not diligent, not that the Department was dilatory. (C 1-50). Finally, the court correctly states that there was no record that the Shafers had filed any petition for adoption. Yet it was stated at the outset of the evidentiary hearing that the Shafers[2] intended to adopt the child (R 9), and the trial court appropriately considered that as an option to be considered in determining the best interests of the child.

The Appellate Court reversed, finding that the wrongful exercise and misuse of state power resulted in stalling and frustrating the timely petition of adoption filed by the grandparents resulting in the child's attachment to the foster parents. The court concluded this wrongful exercise of power requires appropriate restraint to correct such wrongs whenever they appear. Thus, the denial of the adoption by the grandparents was reversed. (347 N.E.2d at 303).

[2] Foster parents under the Juvenile Court Act have a right to notice and to be heard at all stages of any proceeding or hearing under the Act. Ill. Rev. Stat. ch. 37, § 701-20(2).

THE STAGE IN WHICH THE CONSTITUTIONAL ISSUES WERE FIRST RAISED

The constitutional issues were raised for the first time by the decision of the Appellate Court and appealed in a petition for leave to appeal the Appellate Court decision to the Illinois Supreme Court. The petition was denied on October 21, 1976; a petition for reconsideration was denied on November 12, 1976.

REASONS FOR GRANTING CERTIORARI

I.

THE CHILD'S STATUTORY RIGHT TO AND LIBERTY INTEREST IN A CONSIDERATION OF HER BEST INTERESTS AND WELFARE WAS DEPRIVED BY THE REVIEWING COURT WITHOUT DUE PROCESS OF LAW.

The Illinois Adoption Act provides that:

> "The welfare of the child shall be the prime consideration in all adoption proceedings." Ill. Rev. Stat. ch. 4, § 9.1-15.
>
> "The best interests and welfare of the person to be adopted shall be of paramount consideration in the construction and interpretation of this Act." Ill. Rev. Stat. ch. 4, § 9.1-20a.

Where there is consent of the parents or the parents have been declared unfit, the sole basis of adoption is what is in the best interests of the child. *In Re Jones*, 34 Ill. App. 3d 603, 607, 340 N.E.2d 269, 275 (1975). Here, the parents had given their consent and had been declared unfit. (Supp. 1). All parental rights were terminated. (C 34-37).

The child under state law has a legitimate claim to the court's consideration of her paramount interests. The state, having chosen to extend that right, may not withdraw that right without a fundamentally fair procedure. The reviewing court's vicarious review of evidence on matters not at issue and fully explored in an adversarial context on the premise of policing a state social agency, denied the child's right to understand the nature of the issues and a hearing on those issues in accordance with due process of law. The child was denied her statutory right to a consideration of her best interests by the reviewing court's interjection of a new issue which became dispositive of the case which was based on a reinterpretation of evidence irrelevant to the issues presented at trial and which the record fails to support.

The child has a protectable liberty interest which requires consideration in accordance with due process of law. See *Board of Regents v. Roth*, 408 U.S. 564 (1972); *O'Conner v. Donaldson*, 422 U.S. 563, 573 (1975); *Drummond v. Fulton City Department of Children and Family Services*, 547 F.2d 835 (5th Cir. 1977). In *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944), this Court declared:

> "that liberty . . . is the interest of youth itself, and of the whole community, that children be both safeguarded from abuse and given opportunities for growth into free and independent well developed men and citizens."

Clearly, the paramount consideration of all those involved in the adoption process is the child's placement in a home which provides a caring and stable environment. At this critical stage of the child's development, any action will clearly affect her future life, security and stability. This paramount interest compels protection as afforded by due process of law.[3]

Here, the reviewing court's disposition of this matter establishes a precedent of subjugating the statutory and constitutionally protected right of the child to a paramount consideration of her best interests, to vindicating, indeed punishing, the supposed indiscretions of the Department which were neither acknowledged by the parties in interest nor raised as an issue by the parties at the trial. Yet, this allegedly questionable intrusion by the Department became the dispositive issue of the case.

Due process requires more than a summary disposition of factual issues which have never been presented. Thus, the child's constitutional right to due process has been denied. This deprivation justifies the granting of this petition for certiorari.

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[3] Goldstein, Freud, Solnit, Beyond the Best Interests of the Child (The Free Press, 1973). Foster & Freed, A Bill of Rights for Children, 6 Fam. L.Q. 343, 355-57 (1972); Hansen, The Role and Rights of Children in Divorce Actions, 6 J. Fam. L. 1 (1966); Batt, Child Custody Disputes, 12 Willamette Law Journal, 491 (1975); Note, the Illinois Juvenile Court Act, 9 J.M.J. of P. and Pro. 396 (1976); Note, A Child's Due Process Right to Counsel in Divorce Custody Proceedings, 27 Hastings L.J. 917, 918-19 (1976); Comment, The Roles of the Child's Wishes in California Custody Proceedings, 6 U.C.D.L. Rev. 332 (1973); Watson, The Children of Armageddon, 21 Syracuse L. Rev. 55 (1969); Bodenheimer, The Rights of Children and the Crisis in Custody Litigation, 46 U. Colo. L. Rev. 495, 498-99 (1975); In the Child's Best Interest, 51 N.Y.L. Rev. 446, 449-51 (June, 1976).

II.

DUE PROCESS REQUIRES THE REVIEWING COURT TO REMAND FOR A NEW TRIAL WHERE NEW FACTUAL ISSUES ARE RAISED IN THE REVIEWING COURT AND MADE DISPOSITIVE OF THE CASE.

The child has a constitutional and statutory right to appellate review in accordance with due process of law. The reviewing court determined that "since the welfare and best interests of a child are involved, we are not required to limit our review to the points of concern raised by appellants." The sole issue raised on review was "whether because of the intervention of the Department . . . the judgment of the court is manifestly demonstrated by the record to be contrary to the best interests and welfare of the infant." 347 N.E.2d at 294.

The sole factual and legal issues before the trial court were whether the grandparents were fit adoptive parents and whether the best interests of the child justified the adoption. The issue raised before the reviewing court was neither considered nor raised by any of the parties at trial. The reviewing court relied on this issue and decided it without the benefit of a hearing on the new factual issue, apparently on the premise of protecting the child's interest[4] and efficaciously disposing of the issue.[5] See, *In re Gault*, 387 U.S. 1, 14-20 (1967). See also, *Kent v. United States*, 383 U.S. 541 (1966). Yet this issue became dispositive on appeal.

This court has declared that where important decisions turn on questions of fact, rudimentary due

[4] "The procedural rights assured to the minor shall be the rights of adults unless specifically precluded by laws which enhance the protection of such minors." Ill. Rev. Stat. ch. 37, § 701-2(3)

[5] See, *People v. Armour*, 15 Ill. App. 3d 528, 305 N.E.2d 47, 51 aff'd. 59 Ill. 2d 102, 319 N.E.2d 496 (1973).

process requires notice of the charges or issues presented, an opportunity to be heard which includes the right to confront and cross examine in a manner commensurate with the nature of the interest involved. *Goldberg v. Kelly*, 397 U.S. 254, 269-70, 90 S.Ct. 1011, 1021, 25 L.Ed.2d 287 (1970). These fundamental requirements were not observed by the reviewing court. The reviewing court in reaching its decision relied on evidence unrelated and incidental to the issues at trial. The reviewing court vicariously made findings of fact which were not at issue and are unsupported by the record of the trial court.

The requirements of due process have been imposed on far lesser interests than the judicial review of the placement of an abandoned child in a proper home with adoptive parents. In *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971), a due process hearing was required prior to the suspension of a motor vehicle registration and a driver's license. In *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 578 (1972), due process was required where an expectation of continued governmental employment was subject to termination. In *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975), due process required a hearing where a student was temporarily suspended from school. In each instance important decisions turned on questions of fact. Due process required that those subject to a deprivation of an important interest were entitled to an opportunity to understand the issue raised and an opportunity to respond in a manner commensurate with the nature of the interest at stake. Here a child has been deprived of her right to effective appellate review on issues raised and on facts presented at trial. The Appellate Court relied on new factual issues which required an additional determination of fact; the cause

hearing consistent with due process. In Re Adoption of Burton, 356 N.E.2d 1279, 1284, 1 Ill. Dec. 946, 951[6] (1976). In *Stanley v. Illinois*, 405 U.S. 645, 657, this court declared:

> "The constitution recognizes higher values than speed and efficiency. Indeed one might fairly say of the Bill of Rights and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizen from the overbearing concern for efficiency and efficacy . . ."

The reviewing court's failure to remand for a hearing on the new issues raised denied the petitioner due process of law. This deprivation justifies the grant of certiorari to review the judgment below.

III.

TO PLACE A CHILD AS THE FIRST ALTERNATIVE IN THE HOME OF A SUITABLE RELATIVE CREATES AN ARBITRARY CLASSIFICATION TO THE DETRIMENT OF THE CHILD'S BEST INTERESTS AND IS NOT IN ACCORDANCE WITH THE JUVENILE COURT ACT.

The reviewing court declared that the Juvenile Court Act provides that if a minor is adjudged a ward of the court and the parents are unfit, the court may as the "*first alternative* place the child in the custody of a suitable relative." (347 N.E.2d at 301). No such priority exists. The Act declares that the child may be placed "in the custody of a suitable relative *or* other persons." Ill. Rev. Stat. ch. 37, § 705-7(1)(a). The determinative factor

[6] The court declared . . .
". . . an outright reversal might result in overlooking what the legislature has directed should be our paramount consideration—the best interests and welfare of the children involved—we have decided to remand this case to the Circuit Court of Massac County for a new trial, and direct that it be tried before a different judge."

is what are in the best interests of the child. Whenever alternative plans are available, the court is required to ascertain and consider, to the extent appropriate in the particular case, the views and preferences of the minor. Ill. Rev. Stat. ch. 37, § 705-7(2).

The reviewing court's interpretation of ch. 3, § 705-7(1)(a) creates an irrebuttable presumption against other potential adoptive unrelated parents in violation of this Court's prohibition. See, *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed. 2d 551 (1972). This denies equal protection to other potential unrelated adoptive parents as well as denies the child of her paramount interest to a consideration of her best interests.

Here, the evidence established that the child had a psychological attachment to the foster parents and the child indicated a clear preference to remain with the foster parents. Serious and justifiable reservations were expressed by the trial court in placing the child with the grandparents. Cf., *In Re Petition of Niskanen*, 223 N.W.2d 754 (Minn. Sup. Ct. 1974). The evidence indicated a poor relationship between the grandparents and natural parents because of their drug addiction, life styles, and thievery. The record also indicated a disruptive impact on the child when confronted with the natural parents. There being no statutory preference of placement, the only guiding light was the best interests of the child.

IV.

ASSUMING, *ARGUENDO*, THAT NO CONSTITUTIONAL ISSUE IS RAISED, THE APPELLATE COURT ERRED.

1. Illinois Law Precludes Appellants From Raising Issues Not Presented In The Trial Court And Properly Preserved For Review.

The grandparents raised for the first time in the reviewing court the question of the propriety of the actions of the Department of Children and Family Services in supervising and investigating the grandparents. Illinois law precludes the review of any question not raised in the pleadings, nor in any manner presented to or urged or raised in the trial court. The Appellate Court simply reviews a case presented to the trial court and does not sit to try new issues presented for the first time in the Appellate Court. *Hedlund v. Miner*, 395 Ill. 217, 69 N.E.2d 862, 869 (1946); *Maroney v. Maroney*, 109 Ill. App. 2d 162, 249 N.E.2d 871, 873 (1969). An exception has been expressed by the Illinois Supreme Court; *viz.*, only where all the factual matters necessary for determination are presented in the record before the reviewing court and the parties have argued and briefed the matter and the issue is of great public importance may the reviewing court consider an issue which has not been presented before the trial court. *People ex. rel. Baylor v. Bell Mutual Casualty Co.*, 54 Ill. 2d 433, 298 N.E.2d 167, 171 (1973); *Doran v. Cullerton*, 51 Ill. 2d 553, 558-59, 283 N.E.2d 865 (1972). Here, the issue was not presented at trial, all necessary factual matters necessary for determination are not present, the matter is important as far as this child is concerned but has no profound impact upon the citizenry of the state. Thus, under Illinois law the Appellate Court inappropriately ruled on factual issues which were never raised as issues at trial.

2. Illinois Law Does Not Grant Appellate Court's Jurisdiction To Rely On New Factual Issues And Decide Them Without Notice Or An Opportunity For A Hearing.

The reviewing court cited three Illinois cases to stand for the proposition that since the best interests of the child are involved, the reviewing court is not required to limit its review to the factual issues raised in the trial court. (347 N.E.2d at 294). None of the authorities cited authorizes a reviewing court to raise new factual issues which are dispositive of the case and decide the factual evidence without an evidentiary hearing. A short analysis of the cases relied on for this proposition by the reviewing court follows.

In *Muscarello v. Peterson*, 20 Ill. 2d 548, 170 N.E.2d 564 (1960), the reviewing court reversed and *remanded for a new trial* where a minor was unduly restricted in her right to cross-examine defendant's medical expert's report which deleted a paragraph which disclosed a causal connection between the trauma and the minor's epileptic condition as well as the necessity of an electroencephalogram as a necessary element of a complete neurological examination. In *Layton v. Miller*, 20 Ill. 2d 548, 170 N.E.2d 564 (1960), the reviewing court reversed and *remanded for further proceedings* the dismissal of an inarticulately pleaded petition for custody of a child which suggested severe neglect. In *Phelan v. Santelli*, 30 Ill. App. 3d 657, 334 N.E.2d 391 (1975), the reviewing court reversed a jury verdict and *remanded the cause for a new trial* on the issue of damages where a jury verdict was entered against the minor plaintiff in a personal injury action. The court found as a matter of law the facts established liability, notwithstanding the jury's determination in a special interrogatory that the defendant's negligence, if any, was not the proximate cause of plaintiff's injury. The issues of the negligence action were

clearly defined and the evidence was fully explored by the parties in an adversarial proceeding.

None of these cases cited by the reviewing court grant jurisdiction to an appellate authority to consider new factual issues *and* on review make those issues dispositive of the cause without remanding for a new trial in accordance with due process of law.

3. The Trial Court Properly Exercised Its Discretion In Investigating The Grandparents Prior To Adoption.

The reviewing court suggests that the "investigating time, and proof" are dispensed with in the case of adoptions of a related child. (347 N.E.2d at 301). The trial court properly exercised its discretion to investigate proposed adoptive families when related. Ill. Rev. Stat. ch. 4, § 9.1-16. Indeed, where a neglected child is involved, it would be ludicrous to suggest that a court hand over a child declared abused and neglected to "relatives" without a background investigation.[7] Here, the trial court requested an investigation in the adoption proceeding prior to the Department of Children and Family Services appearing in the matter.

The reviewing court asserts that the Department requested the investigation as a part of its apparent plan to defeat the adoption petition of the grandparents. The record does not disclose any such evidence. The reviewing court's opinion seeks not to provide for the best interests and welfare of the child, but to punish the Department for indiscretions not found in the record.

[7] In *Layton v. Miller*, 25 Ill. App. 3d 834, 322 N.E.2d 484 (1975), the grandparents who were granted custody of the neglected child relinquished the child to the father in violation of the court's order.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Appellate Court, Fourth District, State of Illinois.

Respectfully submitted,

LORENCE H. SLUTZKY
29 South LaSalle Street - 860
Chicago, Illinois 60603
(312) 332-7760

Counsel and Guardian Ad Litem for Petitioner Christina Marie Smith

ROBBINS, SCHWARTZ, NICHOLAS & LIFTON, LTD.
29 South LaSalle Street - 860
Chicago, Illinois 60603

DOUGLAS C. NOHLGREN
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611

Of Counsel

APPENDIX

APPENDIX I

38 Ill.App.3d 217, 347 N.E.2d 292

In the Matter of the ADOPTION OF CHRISTINA MARIE SMITH, also known as Christina Smith, a minor.

GEORGE SMITH and NATALIE SMITH,

Plaintiffs-Appellants,

v.

CHRISTINA MARIE SMITH, also known as Christina Smith, a minor, *et al.*,

Defendants-Appellees.

No. 12735.

Appellate Court of Illinois,
Fourth District.

May 13, 1976.

BARRY, Justice:

347 N.E. 2d 293

[1] On December 6, 1972, George and Natalie Smith, non-residents of Illinois, filed in the Circuit Court of Champaign County, as cause 72-A-135, a petition to adopt their granddaughter, Christina Marie Smith, born March 29, 1970, in California as the daughter of William and Mary Smith. Attached to the petition were the executed consents of both natural parents together with their written entries of personal appearances in the adoption proceeding. William Smith is the natural son of Natalie Smith and the adopted son of George. The petition alleged that Christina is a resident of Illinois and that the only orders entered affecting her custody were those entered in Champaign County Circuit Court cause 71-J-116 commenced July 16, 1971, under the Juvenile Court Act by the Department of Children and Family

Services, (hereinafter called "Department"), to have Christina declared a neglected child and a ward of the court, all of which orders in 71-J-116 were alleged to have been terminated on September 14, 1972. Burt

Greaves, a Champaign attorney, was appointed guardian ad litem for the infant. On May 2, 1974, a minute entry was made to the docket reciting inter alia, "The parties hereto agree to a consolidation of causes 71-J-116 and 72-A-135." Following a hearing before the court on this consolidated cause, the circuit judge announced his finding that George and Natalie Smith qualify as adoptive parents in every respect but that the best interests of the child required the denial of their petition. Accordingly there was entered on June 7, 1974, a dispositional order denying and dismissing the adoption petition and placing the infant ward under the guardianship of Richard Laymon of the Illinois Department, with authority to consent to the minor's adoption. George and Natalie Smith have prosecuted this appeal claiming only (1) that the circuit court abused its discretion in denying their petition for adoption, and (2) erred in refusing to admit to evidence Petitioner's Exhibit A (which is a seven page report of Dr. James R. Richmond, dated March 29, 1973), and (3) that the record shows such over-reaching and domination by agents of the Department as to have contaminated the proceedings and produced an unjust result. Since the welfare and best interests of a child are involved, we are not required to limit our review of the record to the points of concern raised by appellants. *Muscarello v. Peterson*, 20 Ill. 2d 548, 170 N.E.2d 564 (1960); *Layton v. Miller*, 25 Ill.App.3d 834, 322 N.E.2d 484 (5th Dist., 1975); *Phelan v. Santelli*, 30 Ill.App.3d 657, 334 N.E.2d 391 (3rd Dist., 1975).

[2] The report of Dr. Richmond is essentially a psychiatric evaluation made of George and Natalie Smith by a California practitioner at the suggestion of the Smiths' California counsel upon the premise that it might be useful in prosecuting this adoption petition in

Illinois. It contains a recitation of the history of this case as related to him in separate interviews of the grandparents. Much of this history was produced to the court by direct testimony of many witnesses, and, since the finding of the circuit court that George and Natalie Smith qualify in every way as adoptive parents is fully consistent with the conclusions of Dr. Richmond's report, and with our own view of the record, no prejudicial error derived from the ruling excluding this exhibit from evidence. While the guardian ad litem has argued here that the record contains no showing of positive advantages to the child by placement with her grandparents, it is clear that the trial court in finding them fit persons made a contrary determination which the evidence supports. The only other issue is whether because of the intervention of the Department or for any other reason, the judgment of the court is manifestly demonstrated by the record to be contrary to the best interests and welfare of the infant.

Christina was brought to Illinois by her parents, William and Mary Smith, in 1971 during the time her father was stationed at Chanute air base near Rantoul in Champaign County. In July, 1971, the Department received a report of possible child abuse in respect to Christina from a physician and after an investigation, commenced the juvenile proceedings in 71-J-116 with personal service of summons on the parents. Christina was adjudicated a neglected child and temporary guardianship was placed with the Department where the case was supervised by Mrs. June Henderson, a social worker. Following this order, the Department replaced the child with her parents for a "trial run" to observe whether with Department input, the family could get along. In October, 1971, William was honorably discharged from military service although the record indicates it was actually for abusive use of narcotics. Upon William's discharge, he and his wife indicated to the Department their intentions of returning to California. Believing that the parents were not ready to take the child with them there, the Department obtained a court order in 71-J-116 authorizing them to place Christina with foster parents, which was done.

When Christina's parents returned to California in October leaving Christina behind in Illinois, the grandparents, upon discovering the circumstances, began telephoning and writing to the Department requesting that they be permitted to have custody of their granddaughter in California. Natalie Smith came directly to Illinois for such purpose. After two months of background study, investigation of the home and character of the grandparents, including a personal visit by Mrs. Henderson to their home in California in December, 1971, and after completing arrangements for supervision of the grandparents as a "regular foster home" by California authorities, the Department on January 26, 1972, caused an order to be entered in 71-J-116 giving custody, under its guardianship, to the grandparents who, during the same month, took Christina to their home in California. The evidence indicates that Natalie Smith at the time of trial was 48 years of age and that George was 43, that both are in good health, that George is a major in the Air Force where he has served continuously for 23 years, and that they are financially comfortable.

The record fully supports the complaint of the grandparents that circumstances became intolerable to them during the period that Christina was in their custody in California from January, 1972, until the following September, and that this was in large measure attributable to the intervention of three separate social agencies, (two in California, and the Department) giving conflicting directives in respect to their rights and the rights of the natural parents. It appears that Yolo County, California authorities had undertaken responsibility for rehabilitating the natural parents with the objective of returning Christina to their custody. A Solano County, California agency assumed supervision of Christina and of her grandparents as foster parents. These two agencies maintained contact with Mrs. Henderson.

The grandparents found the drug-oriented, unemployed, long-haired, freaky-dressed, and publicly intimate life styles of William and Mary and their friends distasteful, and objected on occasions to the circumstances attending their visitations of Christina at the grandparents' home. The grandparents were reprimanded by one of the agencies for having voiced their complaints to William during a visitation, and for complaining that some item of property had disappeared from their home after one such visit. Mrs. Henderson, in explanation, testified that the agencies have no authority to set conditions or dress codes for visitation by natural parents to a foster home. She did not discuss whether the agency ever applied to the courts for imposition of such conditions. One agency, said George Smith, sent a woman who came to our house with a law book and read to Christina her rights, and said she was supposed to do that and that we had no rights to our granddaughter and could not discipline her. A different agency counsel[illegible]d that the grandparents had authority to make the child mind. George Smith testified without contradiction that there were many women from these social agencies coming in and out of his home telling them what they could do and what they couldn't do, and Natalie Smith testified that she was ultimately threatened that if she did not do as told, the agencies would take her granddaughter from her custody. Both grandparents testified they would like to raise their granddaughter free from intervention by social welfare agencies.

In the context of these foregoing circumstances, Mrs. Henderson in August, 1972 made an unannounced visit to the grandparents' home in California and found Natalie Smith in an emotionally "up-tight" condition. She also visited William and Mary and found them full of "hate and vindictiveness" toward the grandparents. She testified that they inquired of her "How can we ever buck this [i. e., the grandparents'] money?" She visited the California agencies who voiced to her the observation that the natural parents were not progressing and that it seemed unlikely to them that Christina should

ever be replaced with them. Having grave doubts that Christina could function in this environment, Mrs. Henderson communicated her concerns to Natalie Smith and related the opinions of the California agencies. *Mrs. Henderson then testified that she counselled Natalie that perhaps the best thing to do would be to bring the child back to Illinois for placement in a neutral foster home where she herself could work with Christina and perhaps work with the natural parents, "because,"* said Mrs. Henderson, *"we were still at that time trying to reunite* [her with] *the* [natural] *parents even though I had told the parents and Natalie Smith too, that we were going in for termination if they did respond."* (Emphasis added.)

Barely one month following Mrs. Henderson's visit to California, Natalie Smith *decided to accept Mrs. Henderson's counsel and invitation* to return the child to Illinois. The California agencies she had been told saw no hope of progress; Mrs. Henderson, on the other hand, had counselled that she would continue efforts at reuniting the family if the child were in a *neutral* foster home in Illinois where she could work with her. *On September 11, 1972, Natalie Smith arrived in Champaign with Christina and contacted Mrs. Henderson about her decision to place the child in neutral foster care. It was her obvious intent neither to abandon or surrender her interest in the child's well-being but to accept Mrs. Henderson's invitation that this procedure, professionally, was the best hope for reuniting the family.* She visited the foster home placement with Mr. and Mrs. Shafer at Cerro Gordo and assuming it a *neutral* environment with no purpose of adoption, was favorably impressed with Mrs. Shafer.

Thereafter Natalie Smith returned to California, and contacted counsel to commence adoption proceedings in Illinois, keeping close contact with Christina by telephone inquiries and letters to Mrs. Shafer. The grandparents also sold their home in California and transferred to New Jersey to alleviate the tension they had experienced from their proximity to the natural

parents. George Smith testified that they moved to New Jersey because the Illinois agency indicated they would have a much better chance of adopting Christina if they got out of California; Mrs. Henderson denied only that she told the senior Smiths "to move to New Jersey." Although, as previously noted, Mrs. Henderson had *specifically testified that she counselled Natalie to bring the child back to Illinois, she later denied in her testimony that Natalie Smith's return to Illinois in September, with Christina, was in accordance with any plan of hers.* And while she had given assurances that the placement would be with a *neutral* foster home it later developed that the Department's placement was for purpose of concluding adoption with these foster parents. Thus on November 15, 1972 the Department filed in 71-J-116 a supplemental petition alleging that Christina is a neglected child by reason of "abandonment by her custodian," i. e., the grandparents. On December 6, 1972, the grandparents filed their petition for adoption in 72-A-135 *attaching the executed consents of the natural parents who at that time had the sole power and authority to consent to such proceeding.* On December 21, the Department, without notice to the grandparents, called its supplemental petition in 71-J-116 for hearing and obtained an order finding the natural parents unfit and appointing the administrator of the Department as guardian with power to consent to adoption. *The apparent purpose of such an order was to nullify the consents of the natural parents executed and filed in cause 72-A-135.*

By January 10, 1973, George and Natalie Smith learned of the order entered December 21 in 71-J-116 and filed a petition to intervene and for an order vacating the decree of December 21 upon the grounds that the publication notice in respect to the supplemental petition did not pray an order giving the Department power to consent to adoption or to remove that power from the natural parents. After calling their motion for

hearing on three separate occasions, it was finally adjudicated on May 30, 1973, and the dispositional order of December 21 was vacated. The Department then filed another supplemental petition in 71-J-116 for power to consent to adoption and for termination of the rights of the natural parents. This motion was heard and allowed on August 31, the docket entry showing that the grandparents were present and "do not object to prayer for termination of rights of Mary and William Smith." The record shows, however, that the state's attorney objected to their appearance at this hearing on the grounds of no standing as parties in interest within the meaning of the Juvenile Court Act (Ill.Rev.Stat., ch. 37, § 701-20 (6)). The matter was continued for dispositional hearing. In the meantime, in cause 72-A-135, the Department obtained an order authorizing it to contact *the New Jersey Division of Youth and Family Services for a background investigation and report on Mr. and Mrs. George Smith.* The Adoption Act provides that in the case of a petition for adoption of a related child, no investigative background study of the petitioners is necessary. The order effected an unnecessary delay. Accordingly, Mrs. Henderson, under authority of a court order, wrote a letter dated September 6, 1973, to the New Jersey authorities who upon receipt of the same, mailed a copy for filing with the circuit clerk in adoption cause 72-A-135. Mrs. Henderson's letter reads as follows:

> Dear Mr. Eddison:
>
> . . . . . .
>
> Christina has been in and out of foster homes, including her grandparents, since July 1971 when she was brought to our attention through suspected child abuse report filed by a local hospital. At that time Christina's grandparents lived in Vacaville, California.
>
> After a cursory home and background investigation by the Solano County California Welfare Department, the Department of Children and Family Services permitted Christina to go to California to live with her grandparents in January, 1972. The Solano County Agency agreed to supervise the grandparents home as a foster home and to arrange for visits by Christina's parents on a regularly scheduled basis.

> It soon became apparent to the California agency (and to this worker after two visits to California) that Christina was in the midst of an emotional tug-of-war between the grandparents and Christina's father. It was obvious that Christina had become a pawn in the almost sado-masochistic battle between Natalie and her son, William. The grandmother made an automated showpiece of Christina, who on cue would recite her ABC's and end with "I love you" to anyone who said "hello" or stopped to admire her.
>
> The George Smiths do not lack the monetary means to support a child. In fact, money is their biggest minus. They feel it can buy anything, including love. They had a $50,000 home in California with $100,000 furnishings. Christina was inundated with toys and clothes. She was given anything she asked for and more, except for firm, loving discipline. In no way could anyone stop the grandparents from buying Christina gifts.
>
> George Smith is a Major in the Air Force. He and Mrs. Smith are in their late forties. They have six sons and as many grandchildren. Their son, William, was given an administrative discharge from the Air Force and was granted amnesty under the drug program in the Air Force. Christina's brother, Shawn, was under protective custody of the State of California prior to his birth, because of threats by the father and of continued drug usage by both parents.[1]

[1] While it seems doubtful that Illinois authorities should assume interest in an unborn child whose mother is a resident of California, according to Mrs. Henderson, the pre-natal protective order for Shawn was obtained by California agencies on her advice.

Mrs. Smith's sons have all been disappointments to her and she sees in Christina another chance to succeed as a mother. The Solano County Agency had no luck in trying to get Mrs. Smith to see how she was fulfilling her own needs through Christina or to obtain counseling regarding her problems with her son.

The Department of Children and Family Services and the Solano County agency mutually agreed that it was in Christina's best interest to place her in a neutral foster home and preferably in Illinois. Before we had the chance to convey our feeling to the George Smiths, the grandmother arrived in Champaign, Illinois in September, 1972 asking the Department to take custody of Christina and place her in foster care here, as she could no longer cope with Christina and Christina's father and she saw only a mental institution for Christina if she remained in the George Smith home. [Emphasis added]

In October, 1972, Christina's parents requested the court to return Christina to them. We began termination proceedings. In December Christina's parents signed consents to the adoption of Christina by her grandparents. Many months of legal technicalities followed and our court finally terminated the parental rights in August, 1973. Normally, the Department of Children and Family Services would have been granted the power to consent to adoption but the grandparents' lawyer was granted the right to intervene and the dispositional hearing will be held on September 28, 1973.

The grandparents' lawyer does not wish to accept the home evaluations done by the California agency and the Department of Children and Family Services. He has requested a third and "neutral" party to the situation, namely the New Jersey Division of Youth and Family Services. We know the Smiths will pass muster with no children around and a fan-

cy new home, and the charm will ooze forth, but unless you see the interaction over a period of time between Christina, her grandparents and other relatives you can't assess the situation with any degree of accuracy. Solano County monitored the home for nine months. For two years, I have been on the front end of letters, telephone calls, and face-to-face confrontations. We both are willing to go to court and testify that Christina will never make it in her grandparents home; that she needs to be placed in a neutral adoptive home; and that no relatives be considered as adoptive parents.

However, we will abide by the court's wishes. We will appreciate it if you can send some sort of a home and background assessment to us prior to September 28, 1973. . . . .

. . . . . .

Thank you for your cooperation in this matter. A little girl has been kept in limbo for two years. We are all anxious to conclude the legal hassle with a happy ending. However, we do not see the adoption of Christina by her grandparents as that happy ending.

Sincerely,

(Mrs. June C. Henderson, ACSW
Child Welfare Worker.

On May 2, 1974, a docket entry was made ordering the consolidation of causes 71-J-116 and 72-A-135 and

calling the same for hearing. At the commencement of this hearing, the Department indicated to the court that if its guardian administrator were to be given the power of consent to adoption, he expected to consent to an adoption by the Shafers (i. e., the persons whom Mrs. Henderson consistently labeled "neutral" foster parents', and not by the grandparents. The Shafers then had no

petition for adoption pending and were not called as witnesses although all parties admit they are fit persons to adopt.[2] The report of the investigation by the New Jersey agency dated September 21, 1973, addressed to the Illinois Department in response to its inquiry *was never filed or offered by the Department.* A copy of it had been directed to the Smiths, however, and was offered and received in evidence as the Smiths' exhibit *over* hearsay *objections* interposed *by the Department.* It reads as follows:

> Dear Mrs. Henderson:
>
> We are writing in answer to your request for a home evaluation of George and Natalie Smith. On September 17, 1973, Mr. and Mrs. George Smith were visited at home for an interview.
>
> The Smiths live in an upper middle class housing subdivision of about 30 homes in semi-rural surroundings. The house has four bedrooms and is very attractively furnished. The large back yard is fenced and there is more than adequate play space both outside and inside the home. The Vincentown Elementary School is less than two miles from the home.
>
> George Smith is a 42 year old high school graduate who is an Air Force Major at the McGuire Air Force Base. At the present time, he is engaged as an aircraft scheduler and is in good health. Both Mr. and Mrs. Smith are very active in the local Roman Catholic Church and in Base activities. Natalie Smith is a 46 year old high school graduate. She is in good health and a housewife.

[2] We take notice since the hearing on this appeal, that another appeal has since been filed herein as cause No. 12993 from the Circuit Court of Piatt County in which that court, during the pendency of this proceeding, without notice to petitioners in this proceeding or to the Champaign County Circuit Court, entered a decree of adoption of Christina on the petition of Shafers filed May 16, 1974 and with the consent of the guardian administrator of the Department.

Both Mr. and Mrs. Smith are very concerned about adopting their granddaughter, Christina Marie Smith, and expressed this concern in terms of frustration, worry and tenseness. They said that they do not understand why there would be any question of their raising their granddaughter, because they have the consent of her parents, they have readily expressed their affection for her, and they have already successfully cared for her on two occasions for an extended period of time. Furthermore, Mr. and Mrs. Smith say that they have always had a good marital relationship and that they have always expressed concern for one another.

There is no doubt that Mr. and Mrs. Smith have the monetary means to support a child. Mr. Smith stated that he brings home about $1600.00 a month as well as full medical and other military benefits.

As indicated above, Mr. and Mrs. Smith have cared for their granddaughter on two occasions. First, they cared for her during the first few months of her life until her parents decided to raise her themselves.

After Christina's parents decided that she was too much of a burden for them, George and Natalie Smith took the child to live with them again. They claim they asked the Department of Children and Family Services to place Christina in an Illinois foster home because their lawyer told them that this was the proper thing to do.

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Because you indicated an "almost sado-masochistic battle between Natalie and her son, William", their relationship was probed in detail. Mrs. Smith insisted that she loves her son although she cannot approve of his taking drugs, his abandoning Christina, or his not working. She seemed to have a genuine concern for his welfare. Furthermore, Mrs. Smith

said that William shows no interest in the child and that she felt certain that he would not visit his daughter in New Jersey because of the distance from his home.

Although Mr. and Mrs. Smith did express some disappointment in their other sons' career choices, they seemed to have concern for them as persons and said that they keep in touch with their whole family on a regular basis. They described some recent visits from their sons and families in some detail.

Because there seems to be a great deal of concern on your part regarding Mrs. Smith's need for counseling, her mental stability was examined. Mrs. Smith definitely gives the impression of being tense, nervous and easily given to tears. Furthermore, she said that she spent a period of time in an orphanage and it appears that she equates her experience there with Christina's experience now. In spite of her difficulties, Mrs. Smith does not seem to be as abnormal as depicted in your letter of September 6, 1973, and her concern for Christina seems genuine. Mr. Smith also seemed a bit nervous, but again this did not appear at all unusual considering that he was speaking of an emotionally charged subject. His concern for Christina also seems very sincere.

In conclusion, it definitely seems that Mr. and Mrs. Smith are eager, willing and able to care for their granddaughter, Christina. It should be kept in mind; however, that because of the deadline of the court hearing, no outside sources of information regarding the Smiths—relatives, friends, or interested persons in the community—could be obtained.

I hope this evaluation will be helpful in the court's disposition of this young child.

Very truly yours,

(Miss) Virginia Monaghan, MSW
Assistant Supervisor
[State of New Jersey
Department of Institutions and Agencies
Division of Youth and Family Services
50 Rancocas Road
Mt. Holly, New Jersey 08060]

In holding for the Department the Court stated that in the case of an adoption by the grandparents, there would exist a "substantial likelihood in the future that the problems with regard to the natural parents will be much greater if the child is allowed to be adopted by its grandparents" rather than others, that the child apparently has a substantial attachment under local placement and that the question of the grandparents' age is also relevant since by the time she would be 16 years of age, she will have lived as an only child and Mrs. Smith will be past sixty at a time when it would be difficult to deal with the problems most young people confront at that age. It decided that it was in the best interests of the child to deny the adoption petition. The decision conforms with the philosophy of the Department as expressed by Mrs. Henderson, that *neutral* placements, i. e. in non-related homes, are usually more successful and for the best interests of the child, partly because it eliminates confusion "as to who mommy and daddy are."

[3] The legislature, in the provisions of the Adoption Act, while defining the child's best interests as the paramount concern recognized it to be an important

interest of a child that his relationships to the persons, places and course of inheritance where Providence has placed him be preserved where possible, and that this interest should be subordinated only when, considering other important interests, a different placement is clearly indicated. *Jackson v. Russell*, 342 Ill. App. 637,

97 N.E.2d 584 (1951). Many of the investigative, time and proof requirements of the Adoption Act which are applicable in the case of an adoption by unrelated persons are dispensed with in case of adoptions of a "related child." By provisions of Ill. Rev. Stat., ch. 4, § 9.1-1 B, a "related child" means, inter alia, a child subject to adoption where either or both of the adopting parents stand in the relationship of grandparent to such child. Where the valid consents of the natural parents to an adoption by related persons have been executed and filed in such a proceeding, as here, and petitioners, as here, are fit persons, there should be no occasion whatever for subsequently inquiring in a juvenile proceeding as to the fitness of those natural parents; their residual parental rights were already surrendered to the court by valid consents.

[4, 5] The provisions of the Juvenile Court Act at Ill.Rev.Stat., ch. 37 also reflects a consistent legislative purpose of defining as public policy that the interests of a child in his natural relationships should be preserved wherever practicable. At § 705-7 of the act, it is provided that if a minor has been adjudged a ward of the court and the parents to be unfit, the court may as the first alternative place the child in the custody of a suitable relative. The provisions for granting to a guardian the power to consent to an adoption is given as a later preference by a subsequent alternative at § 705-9. It is plainly the legislative purpose and policy of this act also to preserve and to strengthen the child's natural family ties whenever possible. It is not designed as a depository of powers by which the Department is licensed to enforce sociological theories of its personnel that neutral placements are ordinarily in the best interests of adoptable infants. Neither was it designed to provide an arsenal of strategic means by which the Department was empowered to frustrate proceedings for adoption by fit grandparents because of its belief that a different possible alternative is better. It is the function of the Department to execute and enforce the public policy defined by the legislature and not to supplant that

by substituting its own different policies and theories. The supplemental petition filed by the Department in 71-J-116 on November 15, 1972 to the effect that Christina was a neglected child by reason of "abandonment" by her custodian was manifestly untrue, and ought to have been recognized as untrue by the Department. Abandonment is evidenced only by some conduct which indicates a settled purpose of relinquishing all interest in the child's well being. See, *In re Cech*, 8 Ill.App.3d 642, 291 N.E. 2d 21 (1st Dist., 1972). Mrs. Henderson, in her own testimony, corroborated that she had invited Natalie Smith to bring the child to Illinois for temporary *neutral* foster care for the contemplated purpose of working with the child to reunite her with her own family. Having so testified, her subsequent assertion that the return of the child in September, 1972 was not "according to her plan," and the Department's petition filed in November, 1972, alleging "abandonment by the child's custodian," must be recognized as remarkably inconsistent with the truth, and further corroborative of George Smith's testimony that the social agencies acted and spoke inconsistently, and that their motives were subject to suspicion. Mrs. Henderson did not deny that she was aware of the grandparents' intention to petition for adoption or that she advised that their removal from California would enhance their prospects. She denied only that she suggested they should move to New Jersey. When the grandparents did move from California and filed a petition to adopt, the Department made repeated efforts to frustrate that

proceeding by subsequent efforts to nullify the consents of the natural parents. Mrs. Henderson also effected delays by obtaining court authority in the adoption proceeding for an investigative report of the grandparents in New Jersey, although the adoption act recites that such reports are not required in instances of petitions for adoptions of related children. Her letter to

the New Jersey authorities was a conspicuously irresponsible attempt to condition the New Jersey authorities as to the type of response she expected; the New Jersey authorities placed a copy of it in this record, *not the Department.* When the New Jersey report of investigation was favorable to the grandparents, Mrs. Henderson and the Department attempted to suppress it, and objected to petitioners' attempt to offer it to evidence. Having successfully acted to delay, frustrate and prolong the adoption proceedings, the Department then argues that because of attachments that have been permitted to form, during this prolonged interval, between the child and her foster home, it is in the child's best interests not to disrupt that relationship. *This record contains no evidence* that the Shafers had filed any petition for adoption, however, and there was therefore no basis for a conclusion by the Circuit Court of Champaign County that that relationship would not become disrupted in any event. Moreover, during most of the period the child has been with the Shafers, the Shafers, have been fully aware of the grandparents desire to adopt and the consents of the natural parents.

In *Madsen v. Chasten*, 7 Ill.App.2d 21, 286 N.E.2d 505, 506 (4th Dist., 1972), the petitioning husband was 53 years old and the petitioning wife was 58. The unrelated infant had been placed in their home since she was four days old. The investigative report had recommended to the court that because of their ages, petitioners "may not be able to cope with all the problems facing the girl through difficult pre-adolescent and adolescent years,' and recommended that the petition be denied. The trial court denied the petition and made the infant a ward of the court and directed an institutional guardian to place the child in a home other than petitioners. The appellate court reversed and remanded with directions to grant the petition for adoption. In so holding the reviewing court stated that if it were to accept the rule that age itself precludes adoption, *it would nullify a substantial number of adoptions contemplated by the legislature*, which in speaking of instances of adoptions of related children defines related child at Ill.Rev.Stat., ch. 4, § 9.1-1 as one standing in the relationship to petitioners as a grandchild. The appellate court cited three other cases where trial courts had been reversed on review for denying adoption petitions on the basis of age only: *Williams v. Neumann*, 405 S.W.2d 556, (Ky., 1966) where the petitioning husband was 73 years and his wife 53; *In re Duke*, 95 So.2d 909 (Fla.S.Ct., 1957) where the petitioning husband was 48 and his wife 63 and the child 2½ years; and *In re Adoption of Brown*, 85 So.2d 617 (Fla.S.Ct., 1956) where the husband was 57 and the wife 53.

In *Taylor ex rel. People v. Taylor*, 30 Ill.App.3d 906, 334 N.E.2d 194 (1st Dist., 1975), respondent appealed from an order entered in 1974 finding her an unfit mother of her three infant children on the petition of the Department, and appointing a guardian to consent to their adoption pursuant to provisions of the Juvenile Court Act. The children had been placed in the custody of the Department in 1969, and the finding of unfitness was based on testimony produced by the Department that respondent had since failed to maintain a reasonable degree of interest, concern or responsibility as to the children's welfare. The proof also showed, however, that the Department had refused respondent's requests for information as to the whereabouts of her children, refused her all opportunity to contact the children and refused to correspond with her about their welfare although on occasions she sent money for the children.

In reversing the judgment of the circuit court, the appellate court held "We do not believe that the Department should be permitted to prevent a parent from contacting her children and then claim that the parent is unfit solely because she did not do so."

[6-8] Similarly, it is our judgment here that the Department cannot be permitted by proceedings under the Juvenile Court Act, to stall and frustrate a timely

petition by fit grandparents for custody and adoption, and then claim that the child's attachments to foster parents, permitted to be formed during this interval, should be preserved, and that the best interests of the infant are better served by refraining from disturbing the relationship it has created. If we were to accept that argument as valid it would provide a rule whereby even a child snatcher who successfully concealed the identity of the infant for some long interval of six years could, with more or at least equal validity, establish custodial rights by proof that excellent loving care had been provided and that it would be disruptive of attachments that had been formed and contrary to the best interests of the infant to break them. If, as we believe the record shows here, any attachments that have grown were seeded and nurtured by the wrongful exercise of State powers, no appropriate restraints to protect individuals from official abuse are possible unless the courts will inevitably act to correct such wrongs whenever they appear. It is an important responsibility of the courts, even where such duty is an unhappy one, to preclude public agencies from misusing powers granted by the legislature for the purpose of defeating legislative intent. Fortunately, Christina is about to enter schooling and hopefully is at an age where adjustments to change, with careful guidance, (and perhaps professional help), can yet be successfully effected. We feel considerable sympathy for all parties affected by this decision but conclude, nonetheless, as follows:

1). That the finding as to the fitness of the petitioning grandparents is fully supported by the evidence and the law and was correct.

2). That, in the adoption proceeding, the consents of both natural parents were filed in proper form at a time when the right to consent was vested by law in the natural parents.

3). That the trial court erred in proceeding on the Department's subsequent petition to adjudicate the natural parents unfit and to vest the power

to consent to adoption in the Department without first considering the pending adoption proceeding.

4). That the finding of the circuit court that the best interests of the child required that the petition of her grandparents, who were correctly found to be fit persons to adopt, should nonetheless be denied because of attachments that formed during the period the Department interfered with such proceedings is contrary to the manifest weight of the evidence and to the law; and

5). That the Department's abuse of authority granted by the legislature must be corrected.

Accordingly, the judgment of the circuit court is reversed and the cause is remanded with directions to enter an order granting the petition to adopt and to make such other orders in aid thereof, as shall forthwith effect the transfer of custody in accordance with the directives of this opinion.

REVERSED AND REMANDED.

ALLOY, P.J., and STENGEL, J., concur.

APPENDIX II

38 Ill.App. 3d 232, 347 N.E.2d 304

LARRY JOE SHAFER and JUDITH KAREN SHAFER,

Petitioners-Appellees,

v.

CHRISTINA MARIE SMITH, a minor, *et al.*,

Defendants-Appellees,

v.

GEORGE SMITH and NATALIE SMITH,

Intervening Petitioners-Appellants.

No. 12993.

Appellate Court of Illinios,
Fourth District.

May 13, 1976.

BARRY, Justice:

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On May 16, 1974, Larry Joe Shafer and Judith Shafer filed a petition to adopt Christina Marie Smith, an unrelated child. Although there was pending at said time in Champaign County Circuit Court, as consolidated causes 71 J 116 and 72 A 135, a petition by George and Natalie Smith to adopt the same infant, no mention of this fact, (of which the Shafers were aware), was made in their petition, nor was it disclosed that the natural parents had consented to the Smiths' adoption petition. Although no final order was entered in the Champaign proceeding until June 7, 1974, the Shafers' petition, apparently relying upon some oral representations of the judge who heard the Champaign cause, or upon a minute entry to the docket there, alleged that the

rights of the natural parents had been terminated, that defendant, Richard S. Laymon, Guardian Administrator of the Illinois Department of Children and Family Services had authority to consent to the adoption and had indicated his willingness to do so. Only Laymon and the Illinois Department were joined as defendants. No notice was given to George or Natalie Smith. On July 2, 1974, Laymon for himself as Guardian, and for the department, entered his appearance and consented to the Shafers' adoption petition. A copy of a dispositional order entered in Champaign County Consolidated Causes 71 J 116 and 72 A 135 on June 7, 1974, and certified under date of June 11, 1974 was also then filed. That certified Champaign County order adjudicated that

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the pending adoption petition of the Smiths was denied and dismissed, that the natural parents were unfit, and that the infant ward was placed under the guardianship of Laymon, administrator of the Illinois Department, with power to consent to the child's adoption. Accordingly on said July 2, 1974, the Circuit Court of Piatt County entered a final decree granting Shafers' petition for adoption. On July 25, 1974, George and Natalie Smith filed in this cause petitions for leave to examine the impounded records, and for leave to intervene in this cause because it was commenced without notice to them while their Champaign County cause was still pending, and because they were in the process of perfecting an appeal of the Champaign order entered June 7, 1974. They also filed a motion to vacate the Shafers' adoption decree, alleging many jurisdictional defects. On August 20, 1974, all these petitions by the Smiths were denied, and they accordingly have appealed that ruling.

In view of our finding here, we need not discuss the jurisdictional aspects of the Piatt County proceeding or the absence of any application by the Smiths for a stay in respect to the orders entered in the Champaign proceedings during the period of their appeal of that cause. The pertinent issue here is that the validity of the

Piatt County decree of adoption is fully dependent upon the validity of the dispositional order entered in the Champaign proceedings by which the guardian administrator of the Illinois Department obtained authority to appear and consent to the adoption of the infant ward. The validity of that dispositional order was challenged in this court as cause no. 12735 on direct appeal from the Champaign proceedings and was abrogated by our reversal entered May 13, 1976. *Colon v. Marzec*, 116 Ill.App.2d 278, 253 N.E.2d 544 (1st Dist., 1969). For this reason, we reverse the judgment of the Circuit Court of Piatt County and vacate the adoption decree entered July 2, 1974.

Reversed; decree of adoption vacated.

ALLOY, P.J., and STENGEL, J., concur.

APPENDIX III

ABSTRACT OF TESTIMONY OF A HEARING HELD ON MAY 2, 1974 ON THE GRANDPARENTS' PETITION FOR ADOPTION.

The grandmother testified that she was born on February 28, 1926 and presently resided with her third husband in New Jersey. Her son, William, of a previous marriage, had been adopted by her present husband. (R 20-23, C 42). She declared that she was advised of the neglect proceedings in July, 1971. (R 43). In January 1972, she was granted custody of the child in her former home in California under the supervision of the Solano, California County Probation Officer and the Illinois Department of Children and Family Services and the supervision of Yolo, California County Probation Officer.

The grandmother testified that they were subjected to conflicting and contradictory demands by the various public agencies as well as the emotional demands of the child and the child's natural parents. She testified that on September 11, 1972, she voluntarily returned the child to Illinois because of the frustrating and unbearable intrusions by the various public agencies and because of the personal demands upon her household. She also testified that she returned the child to Illinois on advice of counsel so that she could commence adoption proceedings. However, her intention to adopt Christina was never communicated to the Department of Children and Family Services. (R 29, 48-49). The child was returned to the home of the foster parents whom the grandmother described as "beautiful foster parents". (R 51).

George D. Smith, 42 years of age and a major in the United States Air Force, testified that he recently moved to New Jersey to have a better chance to adopt Christina. (R 61). He testified that his household was subjected to scrutiny and contradictory directions and demands by three separate governmental agencies. He stated that they were visited by a woman who read the 1-1/2 year old child her "Miranda warnings"; (R 59); directed by another woman who said that they could not discipline the child; (R 60); and that Mrs. Henderson directed that they must allow the natural parents visitation of the child in their home notwithstanding their affliction with drug addiction and previous thefts of their personal property (R 55); they were also advised by another agency not to allow the natural parents in the home. (R 58).

Psychiatric examinations and reports reflect the conclusion that the Smiths would make appropriate parents for their granddaughter. (R 36, 40, 112).

Mrs. June Henderson, a social worker for the Department of Children and Family Services (Department), testified that the child was referred to the Department on July 7, 1971 on a child abuse report. A temporary guardian placed the child in the hands of the Department and placed her in an emergency foster home. The child was returned to the parents on August 30, 1971 under supervision. The Department was again granted temporary custody when on December 15, 1971, the parents disclosed their intent to return to California. (R 65-66). The child was placed in the Shafer foster home.

The grandparents requested custody of the child in November, 1971, and after a background investigation was completed, they were granted temporary custody in January, 1972, subject to foster home supervision and visitation from the natural parents. (R 66-67).

Mrs. Henderson testified on one of her visitations she was concerned about the difficulty the child was having and the atmosphere existing in the household, i.e., the child was dressed in a fancy party outfit when the temperature was 106 degrees and the child responded very unnaturally, like a robot. (R 70, 77, 93). The attempt to counsel the natural parents was failing and that "the child was a pawn between" the grandmother and her son. (R 72). It was her opinion that the grandmother was having emotional difficulties because of the contact with the natural parents and the reaction of Christina to the contact. (R 78-79). It was her opinion, based upon her reports and those of the cooperating agencies, that Christina would have difficulty in the grandparents' home; that she needed a "neutral foster setting" in California. (R 79-80, 90).

Mrs. Henderson testified that on September 11, 1974, she unexpectedly received a call from the grandmother asking her to meet the grandmother in a motel in Illinois to pick up the child. (R 81-82). The following day the child was returned to the Shafer home where she presently resides. Mrs. Henderson observed that when Christina returned to the Shafer foster home she responded by "Hello Mommy and Daddy . . ." and walked in as if she had never left. (R 84). Mrs. Smith requested Mrs. Shafer to adopt the child (R 82). It was Mrs. Henderson's opinion that the child is happy and relates properly to the family. (R 84). It was stipulated that the child had a psychological identity with the Shafer family. (R 97).

The trial court having heard the evidence concluded that although the grandparents qualified as adoptive parents in every respect, a difficulty arising from the natural parents-grandparents relationship would be

likely to continue and adversely affect the child; that the child would be living as an only child in a home of rather elderly adoptive parents; that in light of the present successful placement of the child in the foster home of the Shafers who expressed a desire to adopt, compelled the conclusion that the best interests of the child required that the petition for adoption by the grandparents be denied. (R 107-109).

APPENDIX IV

ABSTRACT OF TESTIMONY OF A HEARING HELD ON JULY 2, 1974 ON THE FOSTER PARENTS' PETITION TO ADOPT.

On July 2, 1974, in the Circuit Court of Piatt County, Illinois, (74 L 32) an evidentiary hearing was held on the petition of Larry and Judith Shafer to adopt Christina Marie Smith. The court granted the grandparents leave to intervene. Larry Shafer, age 33, and his wife Judith Karen Shafer, age 33, residing in Cerro Gordo, Illinois, with their three children, aged 10, 8 and 5, testified that he had been employed for ten years at Firestone Tire and Rubber Company; that the Department had placed Christina in their home in November of 1971 until January of 1972 and then again on September 22, 1972 until the present. (C 40). They testified that they were financially able to support Christina and give her the love, support, care, education and religious training as their other children. (R 40-43, 46). Mrs. Shafer testified that Christina wanted to be adopted so that she would never have to leave again. (C 46).

Nadine Fork, a probation officer of Piatt County and Shirley Lux, a social worker at the Department of Children and Family Services, were of the opinion based on their personal investigations, respectively, that it would be in the best interests of the child that Christina be adopted by the Shafers. (C 6, 49, 51).

The court having heard the evidence concluded that the Shafers were fit adoptive parents and that it was in the best interest of the child to be adopted by the Shafers. (C 53).